

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSE SANDOVAL SANCHEZ,

Defendant.

NO. CR-09-6047-EFS

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS AND
RELEASING DEFENDANT**

A pretrial conference was held in the above-captioned matter on December 17, 2009. Defendant Jose Sandoval Sanchez was present, represented by Nicholas Marchi. Assistant United States Attorney Alex Ekstrom appeared. Before the Court was Defendant's Motion to Dismiss Indictment (Ct. Rec. [31](#)), which asks the Court to dismiss the Indictment on the grounds that the underlying deportation order is fundamentally flawed because his due process rights were violated when the immigration judge (IJ), and later the Board of Immigration Appeals (BIA), determined that the Antiterrorism and Effective Death Penalty Act (AEDPA) retroactively applied to him and therefore denied him § 212(c) relief from deportation.

1 The Government opposes the motion, contending that Defendant fails to
2 establish a due process violation and prejudice. After reviewing the
3 submitted material and relevant authority and hearing from counsel, the
4 Court is fully informed. This Order supplements and memorializes the
5 Court's oral dismissal.

6 **A. Background**

7 Defendant obtained Legal Permanent Resident (LPR) status in 1987.
8 In 1992, Defendant was charged with ten federal controlled substances
9 crimes. He pled guilty on January 5, 1993, to a single count of
10 Conspiracy to Distribute a Controlled Substance. (EDWA No. CR-92-0248-
11 FVS.) On March 30, 1993, Defendant was sentenced to fifty-one months.

12 Deportation proceedings were commenced. In May 1993, the
13 Immigration and Naturalization Service (INS) issued a Notice of
14 Deportation. A deportation hearing was not held until May 1996; in the
15 interim, on April 24, 1996, Congress enacted the Antiterrorism and
16 Effective Death Penalty Act (AEDPA).

17 AEDPA eliminated § 212(c) relief for aliens such as Defendant, who
18 were convicted of a controlled substance crime. Prior to AEDPA, an alien
19 convicted of certain controlled substances crimes could seek "§ 212(c)
20 relief" from deportation if he served less than five years imprisonment.
21 8 U.S.C. § 1182(c) (as enacted prior to Public Law 104-132, April 24,
22 1996, 110 Stat. 1214). Specifically, in 1993, when Defendant pled guilty
23 and was sentenced, § 212(c) stated:

24 Nonapplicability of subsection (a)

25 Aliens lawfully admitted for permanent residence who
26 temporarily proceeded abroad voluntarily and not under an order
of deportation, and who are returning to a lawful

1 unrelinquished domicile of seven consecutive years, may be
2 admitted in the discretion of the Attorney General without
3 regard to the provision of subsection (a) of this section
4 (other than paragraph (3) and (9)(c)). Nothing contained in
5 this subsection shall limit the authority of the Attorney
6 General to exercise the discretion vested in him under section
7 1181(b) of this title. *The first sentence of this subsection
8 shall not apply to an alien who has been convicted of one or
9 more aggravated felonies and has served for such felony or
10 felonies a term of imprisonment of at least 5 years.*

11 (Emphasis added.)

12 This "§ 212(c) relief" was significantly reduced by AEDPA. The last
13 sentence of § 212(c) was revised to read:

14 This subsection shall not apply to an alien who is deportable
15 by reason of having committed any criminal offense covered in
16 section 1251(a)(2)(A)(iii), (B), (C), or (D) of this title, or
17 any offense covered by section 1251(a)(2)(A)(ii) of this title
18 for which both predicated offenses are, without regard to the
19 dates of their commission, otherwise covered by section
20 1251(a)(2)(A)(I) of this title.

21 Two months following AEDPA, Defendant's deportation hearing was
22 held. Defendant sought a waiver of deportability under pre-AEDPA §
23 212(c). The IJ determined that Defendant was eligible to apply for §
24 212(c) relief given his years of continued residency in the United
25 States, but determined that AEDPA's restrictive § 212(c) applied and thus
26 Defendant could not obtain relief from deportation. Accordingly, the IJ
entered a deportation order.

The BIA affirmed the IJ's decision, ruling that AEDPA applied.
Defendant was deported. Then, on September 1, 2009, Defendant was
charged with the instant offense.

27 **B. Legal Authority and Analysis**

28 Collateral attack of the underlying deportation order is permitted
29 if:

1 (1) the alien exhausted any administrative remedies that may
2 have been available to seek relief against the order; (2) the
3 deportation proceedings at which the order was issued
4 improperly deprived the alien of the opportunity for judicial
5 review; and (3) the entry of the order was fundamentally
6 unfair.

7 8 U.S.C. § 1326(d). Defendant maintains that his removal order is
8 "fundamentally unfair." To support this challenge, he must show 1) his
9 due process rights were violated during the underlying deportation
10 proceeding and 2) he suffered prejudice as a result.¹ *United States v.*
11 *Zarate-Martinez*, 133 F.3d 1194, 1197 (9th Cir. 1998); *United States v.*
12 *Ubaldo-Figueroa*, 364 F.3d 1042 (9th Cir. 2004).

13 1. Due Process

14 Defendant argues that his due process rights were violated because
15 the IJ, and the BIA, retroactively applied AEDPA's restrictive § 212(c).
16 As explained below, the Court agrees.

17 *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), supplies the
18 analytical framework for retroactivity, which includes determining
19 whether the application of the statute to the conduct at issue results
20 in a retroactive effect. A statute is impermissibly retroactive if it
21 "takes away or impairs vested rights acquired under existing laws, or
22 creates a new obligation, imposes a new duty, or attaches a new
23 disability, in respect to transactions or considerations already past."
24 *Id.* at 269 (internal quotation marks and citation omitted).

25 ¹ Because Defendant is bringing a due process claim he is exempt
26 from the administrative exhaustion requirement. *Garcia-Ramirez v.*
Gonzales, 423 F.3d 935, 938 (9th Cir. 2005). Nonetheless, Defendant did
appeal the deportation order.

1 The Supreme Court applied the *Landgraf* analytical framework in the
2 immigration context in *INS v. St. Cyr* and concluded that "[the Illegal
3 Immigration Reform and Immigrant Responsibility Act of 1996's (IIRIRA)]
4 elimination of any possibility of § 212(c) relief for people who entered
5 into plea agreements with the expectation that they would be eligible for
6 such relief clearly 'attaches a new disability, in respect to
7 transactions or considerations already past.'" 533 U.S. 289, 321 (2001)
8 (quoting *Landgraf*, 511 U.S. at 269). Although the Supreme Court was
9 analyzing the retroactivity of IIRIRA, and not its AEDPA counterpart, its
10 retroactively analysis and conclusion apply equally to AEDPA.

11 In *St. Cyr*, the alien defendant pled guilty to a controlled
12 substance crime prior to the April 24, 1996 IIRIRA. Removal proceedings
13 were commenced in 1997 after IIRIRA. The Supreme Court determined that
14 IIRIRA was not retroactively applicable to the convicted alien. In
15 reaching this conclusion, the Supreme Court emphasized that consequences
16 of deportation weigh into an alien defendant's decision to plead guilty.
17 The Supreme Court stated, "[e]lementary considerations of fairness
18 dictate that individuals should have an opportunity to know what the law
19 is and to conform their conduct accordingly; settled expectations should
20 not be lightly disrupted." *Id.* at 316 (citing *Kaiser Aluminum & Chemical*
21 *Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990)). In addition,

22 [t]here can be little doubt that, as a general matter, alien
23 defendants considering whether to enter a plea agreement are
24 acutely aware of the immigration consequences of their
25 convictions. . . . Given the frequency with which § 212(c)
26 relief was granted in the years leading up to AEDPA and IIRIRA,
preserving the possibility of such relief would have been one
of the principal benefits sought by defendants deciding whether
to accept a plea offer or instead to proceed to trial.

1 *Id.* at 323.²

2 Following *St. Cyr*, it is clear that the IJ and BIA impermissibly
3 applied AEDPA's § 212(c) to Defendant. The Government submits that the
4 Defendant must present evidence establishing that he relied on the pre-
5 AEDPA § 212(c). Although the defendant in *Ubaldo-Figueroa* submitted
6 evidence relating to his reliance on pre-IIRIRA law during his plea
7 negotiations, the Court concludes that Defendant need not present such
8 evidence. *St. Cyr* did not require actual evidence of reliance on the
9 prior deportation law, but rather presumed that deportation consequences
10 were part of an alien's considerations during plea bargaining. 533 U.S.
11 at 322 ("There can be little doubt that, as a general matter, alien
12 defendants considering whether to enter a plea agreement are acutely
13

14 ² The Ninth Circuit has recognized that central to the Supreme
15 Court's analysis in *St. Cyr* was the nature of a plea agreement and a
16 defendant's reliance on the existing deportation law when the plea was
17 entered. *Saravia-Paguada v. Gonzales*, 488 F.3d 1122, 1130 (9th Cir.
18 2007). Accordingly, the Ninth Circuit limits *St. Cyr* to defendants who
19 enter a guilty plea; the Ninth Circuit determined that retroactive
20 application of AEDPA or IIRIRA to a defendant found guilty *by a jury* is
21 permitted. See *Armendariz-Montoya*, 291 F.3d 1116 (9th Cir. 2002)
22 (deciding that a jury-convicted alien's due process rights were not
23 violated by application of AEDPA); *United States v. Herrera-Blanco*, 232
24 F.3d 715, 719 (9th Cir. 2000) (applying AEDPA to aliens convicted after
25 a jury trial does not result in a retroactive effect).
26

1 aware of the immigration consequences of their convictions."). In
2 addition, the Ninth Circuit in *Saravia-Paguada* discusses an alien's
3 "reliance *interest*," not actual reliance. 488 F.3d at 1133. Therefore,
4 the Court concludes that Defendant need not set forth specific evidence
5 that he relied on pre-AEDPA law when entering into the plea agreement.

6 Regardless, the plea agreement ensured Defendant that the Government
7 would recommend a fifty-one-month sentence and move to dismiss the other
8 counts, including count 8, which subjected Defendant to a mandatory
9 minimum sentence exceeding five years. Further, Defendant was sentenced
10 to fifty-one months prior to AEDPA. For these reasons, the Court finds
11 that Defendant has a reliance interest of seeking pre-AEDPA § 212(c)
12 relief from deportation. Accordingly, Defendant's due process rights
13 were violated when the IJ, and BIA, retroactively applied AEDPA's
14 restrictive § 212(c) to Defendant.

15 2. Prejudice

16 Notwithstanding a due process violation in the deportation
17 proceeding, Defendant must show that he suffered prejudice as a result.
18 See *United States v. Pallares-Galan*, 359 F.3d 1088 (9th Cir. 2004). To
19 do this, Defendant must show that "an IJ could have concluded that [his]
20 potential claim for relief from deportation would be 'plausible.'" *Id.*
21 at 1104. The Court concludes Defendant establishes a plausible claim
22 given the IJ's finding that Defendant "was eligible to apply [for §
23 212(c) relief] prior to the recent amendment of the statute." Given this
24 finding, the Court determines it is unnecessary to balance the positive
25 and negative equities relating to Defendant's claim for discretionary
26 relief from deportation. *Cf. Pallares-Galan*, 359 F.3d at 1104 (remanding

1 to district court to balance the equities). Defendant has established
2 prejudice.

3 **C. Conclusion**

4 For the above-given reasons, **IT IS HEREBY ORDERED:**

5 1. Defendant's Motion to Dismiss Indictment (**Ct. Rec. [31](#)**) is
6 **GRANTED.**

7 2. Defendant shall be **RELEASED** from U.S. Marshal custody.

8 **IT IS SO ORDERED.** The District Court Executive is directed to enter
9 this Order and to provide copies to all counsel, the U.S. Probation
10 Office, and U.S. Marshal's Office.

11 **DATED** this 18th day of December 2009.

12
13 _____ s/Edward F. Shea

EDWARD F. SHEA

14 United States District Judge

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